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Supreme Court of the United States

OCTOBER TERM, 1954

No. 50

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO., PETITIONER,

vs.

INLAND WATERWAYS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 26, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

No. 910

JOSEPH A. BISSO, Receiver of New Orleans Coal & Bisso Towboat Company

versus

INLAND WATERWAYS CORP.

ADMIRALTY

APPEARANCES:

Deutsch, Kerrigan & Stiles (Francis Emmett, Esq.)
Phelps, Dunbar, Marks & Claverie, Attorneys for Libellant-Appellant.
George R. Blue, Esq., United States Attorney
M. Hepburn Many, Esq., Asst. U. S. Attorney, Attorneys for Respondent-Appellee.

[fol. 2] LIBEL—Filed May 12, 1945

The libel of Joseph A. Bisso, duly appointed, qualified and confirmed receiver of New Orleans Coal & Bisso Towboat Company against Inland Waterways Corporation, in a cause of action, civil and maritime, with respect represents:

I

Libelant is, and at all the times hereinafter mentioned was, the duly appointed, qualified and confirmed receiver of New Orleans Coal & Bisso Towboat Company which was at all material times, the owner of the steel oil barge Bisso #9, which barge, at all material times was under charter to National Oil Transport Corporation.

II

Respondent is a corporation organized and existing under the laws of the United States, the capital stock of

which is owned entirely by The United States of America, and has an office for the transaction of business within the Eastern District of Louisiana. Respondent owns and operates tugboats and towing steamers, amongst other floating equipment, on the Mississippi River and its tributaries, and was and is doing business as a common carrier for hire and as a common tower for hire, under the trade name of Federal Barge Lines. As such, at all the times hereinafter mentioned respondent owned and operated the steam towboat Cairo.

III

Pursuant to its business as a common carrier and common tower for hire, respondent undertook and agreed with [fol. 3] the aforesaid charterer to tow the said steel oil barge Bisso #9 from New Orleans, Louisiana, to Cairo, Illinois.

Said steam towboat Cairo took said Bisso #9 in tow and proceeded up the Mississippi River. While attempting to navigate under the highway bridge spanning the Mississippi River in the vicinity of Greenville, Mississippi, on or about May 12, 1944, the Cairo brought the Bisso #9 into collision with a pier of said bridge, and, as a result thereof, said Bisso #9 was wrecked and beached and became a total constructive loss, having only a junk salvage value.

The said Bisso #9, at the time of said occurrence, had no motive power, no steering gear or steering apparatus, and was unmanned. Said barge was wholly and entirely in the custody and under the control of respondent and the steam towboat Cairo.

The said barge, at the commencement of said voyage was, in every way, seaworthy and properly trimmed, and was in no way accountable for said collision and damage; said collision and the resulting damage were due wholly and solely to the fault of the pilot, master and crew of the said steam towboat Cairo in negligently causing and permitting the said barge to come into contact with the said bridge, and to the fact that the said steam towboat Cairo was unseaworthy for said towage operation, in that she was underpowered and in that her steering apparatus was defective and insufficient for the purpose of said towage, and in that she was not the proper type of vessel either in

design or construction to perform said towing operation, [fol. 4] and in that she was endeavoring to handle a tow which was too large and cumbersome for said towage operation, and for the particular maneuver of passing under said highway bridge, and more particularly in that she failed to break up her tow and navigate under the bridge with various portions of her tow at various times, instead of endeavoring to bring the entire tow under the bridge at one time.

IV

By reason of the premises libelant has sustained damage in the sum of Thirty-five Thousand and no/100 ($35,000.00) Dollars less Eighteen Hundred and no/100 ($1800.00) Dollars, the highest bid obtained for the said wreck after due solicitation of bids for same, or a net loss of Thirty-three Thousand, Two Hundred and no/100 ($33,200.00) Dollars.

V

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that:

(1) Respondent be duly cited to appear and answer on oath all and singular the matters aforesaid;

(2) that after due proceedings had, the court will order, adjudge and decree that respondent pay to your libelant the damages suffered by it, together with interest thereon, and its costs and disbursements;

[fol. 5] (3) and that your libelant have such other and further relief in the premises as in law and justice it may be entitled to receive.

(S.) Deutsch, Kerrigan & Stiles, Phelps, Dunbar, Marks & Claverie, Proctors for Libelant.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 21, 1947

Now comes Inland Waterways Corporation, respondent herein, and for answer to the said libel, respectfully shows:

I

Respondent is without sufficient information to justify a belief that the allegations of Article I of the libel are true, and therefore, same are denied, and libellant put to strict proof thereof.

II

The allegations of Article II of the libel are admitted, except that it is not a common tower for hire, but is a private contract tower.

[fol. 6]

III

The allegations of Article III of the libel are denied, except as hereinafter specifically admitted.

IV

The allegations of Article IV of the libel are denied.

V

Respondent admits the admiralty jurisdiction of this Honorable Court; but denies the allegations of the libel are true and correct, and avers that the full truth will only be found herein.

Further answering, respondent shows:

VI

Respondent is not now, nor has ever been, at any of the times stated in the libel, a common tower or carrier of privately-owned barges for hire between New Orleans, Louisiana and Cairo, Illinois, nor between any other ports on any waterways whatsoever. Respondent acted solely and exclusively as a private tower, and its agreements were subject to such terms and conditions as respondent might lawfully impose upon the contemplated undertakings;

which terms and conditions were fully understood by the owners of the barges to be towed and formed an integral part of the agreements to tow barges.

Respondent shows that as a private tower it was under no duty or obligation to transport the property or barges of libellant between any termini and that every such [fol. 7] undertaking was subject to the terms and conditions which it might, as such private tower, lawfully impose upon and make a part of the agreement for performance of such service.

Respondent further shows that, as a private tower, it would not have undertaken to transport the barge in question unless the owner of the barge, acting through authorized representatives, had agreed to and acquiesced in the terms and conditions under which the respondent undertook to tow the barge or barges to be transported from place to place.

VII

Further answering, and as a separate and special defense, respondent avers that the circumstances attending its agreement to tow Barge Bisso 9. from New Orleans, Louisiana, to Cairo, Illinois, as stated in the libel, were as follows:

On December 1, 1943, Mr. A. W. Frey, of the National Oil Transportation Corporation, charterer of Barge Bisso 9, entered into a blanket towage agreement with the Inland Waterways Corporation, through its former President, Mr. Chester C. Thompson, whereby the Inland Waterways Corporation, agreed to tow certain named barges, including Bisso 9, for account of the libellant, from time to time, and subject to the terms and conditions as set forth in Inland Waterways Corporation, doing business as the Federal Barge Lines, towage contract and towage release form, copies of which were attached to and made a part of said agreements. For greater certainty and more particular reference, there is annexed hereto and made a part hereof [fol. 8] (marked for identification purposes, Respondent's Exhibit A), original agreement signed and documents attached.

Respondent avers that in signing and executing the documents annexed, libellant, through its authorized agents,

servants, employees, and respresentatives, was fully aware, cognizant and informed of the terms and conditions under which the services were arranged and actively solicited that service, subject to respondent's terms.

Respondent pleads the provisions of said agreement and release (Exhibit A), in bar of libellant's right or cause of action against this respondent.

VIII

Further answering, and as a separate and special defense, respondent avers that the Steamer Cairo was at all times mentioned in the libel stout, staunch, strong and seaworthy in every respect; was properly provisioned, fitted, tackled and apparelled, carrying a full complement of competent licensed officers and crew. Respondent specially avers that said steamer Cairo was fully and efficiently powered; the steering gear was in every respect proper, fit and capable; and the Steamer Cairo was by design and construction fully able to handle Barge Bisso 9 in all circumstances attending the incident to the towing of said barge from one place to another on the navigable rivers of the United States.

IX

Further answering, and as a separate and special defense, [fol. 9] respondent avers that nothing which its agents, servant or employees did or failed to do in any respect, caused or contributed to the incident described in the libel.

X

Further answering, and as a separate and special defense, respondent avers that under the terms and provisions of the contract entered into between the respondent and the libellant, the officers and crew of the Steamer Cairo became and were at all times during the performance of the contract, the servants and employees of the libellant herein and any act of omission or commission on their part constituted negligence in law, was and is the negligence of their employer, and this respondent is not liable therefor.

XI

Further answering, and for a separate and special defense, (to be invoked only if the above and foregoing pleas and defenses are not sustained), respondent avers:

When approaching the Greenville, Mississippi Bridge, the steamer Cairo being then stout, strong and capable and in all respects fit and seaworthy and properly manned; the tow properly arranged and secure according to good custom of navigation on the Mississippi River; its navigators being alert and vigilant to effect a proper and safe passage through the river bridge; the steamer was properly maneuvered into position for proper and safe transit when sudden, heavy boils along with the strong current, pushed the tow up against the pier of said bridge, and the starboard stern of Barge APL 102 struck the said pier; the port [fol. 10] coupling on Bisso 9 broke and certain damage was caused to Barge Bisso 9. Respondent shows that nothing which the navigators of the Cairo did or failed to do caused or contributed to the collision but that it resulted solely, only and inevitably from an inscrutable fault or an act of God over which the owner, operator and navigators and crew of the steamer had no control. Respondent avers that it was not at fault for the occurrence above described and there was nothing which it could have done to prevent the collision.

Respondent reserves the right to amend this answer, as, and if, additional defensive facts are revealed in the course of its investigation, making such amendment proper and necessary. And respondent further reserves the right, in the event that the Court should find that the libellant, Joseph A. Bisso, duly appointed, qualified and confirmed Receiver of New Orleans Coal & Bisso Towboat Company, is entitled to a decree in any amount against respondent, to proceed against the National Oil Transportation Corporation in like amount.

Wherefore, respondent prays that after due proceedings had, there be a decree in its favor and against the libellant

dismissing the libel at libellant's cost and for all general relief.

[fol. 11] (S.) A. L. Ponder, Jr., Assistant United States Attorney; Cyrus C. Guidry, Attorney, Inland Waterways Corporation, Proctors for Respondent.

RESPONDENT'S EXHIBIT "A" TO ANSWER

Federal Barge Lines
Operated by
Inland Waterways Corporation

New York, New York, November 29, 1943.

National Oil Transport Corporation
30 Rockefeller Plaza
New York, New York.

Gentlemen:

This confirms agreement reached with Mr. A. W. Frey in his office on November 29th, whereby the Federal Barge Lines, operated by the Inland Waterways Corporation, will tow, until further notice, petroleum barges owned or controlled by your Corporation, as a private carrier by water, on the Mississippi and Illinois Rivers, effective December 1st, 1943, on the following basis:

Northbound loaded—2.2 mills per net ton mile.

Southbound loaded—1.5 mills per net ton mile.

Northbound empty barges—up to 175 feet in length, 40 cents per mile; 175 to 200 feet in length, 55 cents per mile; 200 feet and over in length, 80 cents per mile.

Southbound empty barges—up to 175 feet in length, 30 cents per mile; 175 to 200 feet in length, 40 cents per mile; [fol. 12] 200 feet and over in length, 60 cents per mile.

The above rates are predicated on all loaded barges being loaded to approximate capacity, and in no event not less than 500 net tons per barge. Mileages are to be based upon and calculated on the 1942 United States Coast Guard Light List. It is further understood that all loaded barges will

be subject to a minimum charge of 25 cents per net ton, and the movement of empty barges to a minimum of $50.00 per barge.

It is further understood that the above rates and conditions shall not apply to barges loaded prior to December 1st, 1943.

It is assumed your Corporation will cause to be executed in its behalf the necessary Towing Contract and Releases prior to the movement of any barges under the above terms.

Yours very truly, (S.) H. E. Ruddiman, General Traffic Manager.

Accepted:

National Oil Transport Corporation, New York, New York. By (S.) A. W. Frey. Date ——.

Memorandum of agreement made and entered into this 1st day of December, 1943, by and between the Inland Waterways Corporation, operating the Federal Barge Lines (hereinafter called "Federal Barge Lines") and the National Oil Transport Corporation, with offices in New York, New York.

Witnesseth:

Whereas, the National Oil Transport Corporation contemplates that from time to time it will employ the Federal [fol. 13] Barge Lines to perform towage service in the movement of National Oil Transport Corporation's barges viz: LTC 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, WT 3, 4, 5, 6, DC 1451, EBL 11, 12, Bisso 9 DPC 424-X, 431-X, 432-X, 433-X, 412-X, 455-X, 494-X, DPC 20-Inland, DPC 31-Inland, 65-Inland, 113-UBL, CSVX 1, 2, 3, 4, 5, 6, 7, 8.

Whereas, the parties desire to fix the terms and conditions under which such towage service will be performed in each case, applicable if and whenever one or more of the barges listed above is accepted by the Federal Barge Lines for towage,

Now, therefore, in consideration of the premises and the mutual covenants hereinafter contained, the parties agree as follows:

1. The parties agree that the terms and conditions set forth in Federal Barge Lines' standard form of Towage

Contract and Federal Barge Lines' form of Towage Release, copies of which are attached hereto marked respectively Exhibits A and B, and made a part hereof, shall apply with respect to each and every towage service performed on barge numbers previously listed herein, when tendered by National Oil Transport Corporation and accepted for towage by Federal Barge Lines.

2. The terms of the Agreement shall remain in full force and effect until cancelled by either party which cancellation may be accomplished by fi-teen (15) days' written notice, provided that any cancellation shall not apply to any barge then enroute after acceptance thereof by Federal Barge Lines.

[fol. 14] 3. The rates to be charged by Federal Barge Lines for the performance of such towage are subject to negotiation and agreement in each particular case.

4. Federal Barge Lines will cooperate with National Oil Transport Corporation in developing facts of any accident resulting in damage to any barge of National Oil Transport Corporation or to its cargo, and will endeavor to furnish National Oil Transport Corporation with such information as it may have.

In witness thereof, the parties hereto have executed this contract by their officers or agents therein duly authorized.

Inland Waterway, Corporation Operating the Federal Barge Lines. By (S.) Chester C. Thompson.

Attest:

(S.) Gary Bantey, Secretary-Treasurer.

National Oil Transport Corporation. By (S.) A. W. Frey.

Attest:

(S.) S. T. Foote.

[fol. 15] EXHIBIT A

FEDERAL BARGE LINES

Towage Contract

The Inland Waterways Corporation, operating the Federal Barge Lines, hereinafter called "Federal Barge Lines", agrees to tow the following craft, hereinafter designated as the "craft to be towed" upon the terms and conditions hereinafter set forth when accepted and agreed to by the owner of the "craft to be towed" as evidenced by acceptance endorsed at the foot hereof, to-wit:

(1) The service above mentioned rests alone upon this contract and neither Federal Barge Lines nor its boats or servants shall be held, in any way, to common carrier liability.

(2) This towing contract having been entered into without inspection by Federal Barge Lines of "craft to be towed", it shall be null and void, and Federal Barge Lines shall be under no obligation hereunder, if, in the judgment of the master of the tow, the "craft to be towed", or any part thereof, is unseaworthy, or for any reason would constitute a risk or hazard to the tow, and/or in case any misstatement has been made in giving a description of the "craft to be towed"; provided that nothing herein contained shall impose any duty upon Federal Barge Lines, its agents, servants or employess to inspect the "craft to be towed" or make any one of them liable for damage resulting from failure to make such an inspection or resulting from any error of judgment in making the inspection.

(3) The "craft to be towed" will be moved only at the convenience of Federal Barge Lines and not by any particular tow, and Federal Barge Lines reserves the right to change "craft to be towed" from one to another of its tows as frequently as it may find it convenient to do so.

(4) The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo and neither the boats and/or any other equipment used in said service nor the owner, charterer, or hirer thereof shall be liable for any loss or damage to the "craft to be towed" or its cargo nor for any damage done by the "craft to be towed", however occurring. The masters and crews and employees

of all boats and/or other equipment assisting the "craft to be towed" shall, in the performance of said service, become and be the servants of the "craft to be towed", regardless of whether the "craft to be towed" assists in the service in any way and irrespective of whether they be aboard the "craft to be towed" or in command thereof. Nothing herein contained, however, shall be construed as making the "craft to be towed", its owners, charterers or operators liable or responsible for loss of or damage to the property of Federal Barge Lines or third parties or for loss of life or personal injury for which the "craft to be towed" its owners, charterers or operators would not otherwise be liable or responsible.

(5) "Owner" agrees to indemnify and hold harmless Federal Barge Lines from any liability to or for account of the crew of the "craft to be towed" because of any accident, damage, injury or loss of life to the said crew, or any loss of personal property or effects of the said crew, however arising, and the "owner" agrees to defend any and all suits or other actions which may be brought against Federal Barge Lines by or for account of the members of such crews for the reasons aforesaid, and to pay, satisfy, or [fol. 16] discharge any and all judgments that may be rendered therein, to the full acquittance and discharge of Federal Barge Lines.

(6) Whenever the Inland Waterways Corporation, operating the Federal Barge Lines, uses a chartered towboat in the performance of this Towing Contract, all of the convenants and exemptions from liability herein provided or applicable to the Inland Waterways Corporation, operating the Federal Barge Lines, shall also be applicable to said chartered towboat, its Owner, the Agents of the Owner and their servants and employees.

(7) Whether or not the "owner subscribes an acceptance at the foot hereof, the delivery of the "craft to be towed" to Federal Barge Lines, its agents, servants and employess shall constitute an acceptance of all of the terms and conditions of this contract.

Accepted: . By . Date

: Inland Waterways Corporation, Operating the Federal Barge Lines, By . Its Agent.

Exhibit B

Federal Barge Lines

Towage Release

194

Received from (hereinafter referred to as "owner") Craft No. or name (hereinafter referred to as "craft to be towed"). dimensions

Draft of Barge

Bow		Stern			Bow		Stern	
Ft.	In.	Ft.	In.		Ft.	In.	Ft.	In.
Port				Starboard				

to be towed by the Inland Waterways Corporation, oper- [fol. 17] ating the Federal Barge Lines,

From .....

To .....

in accordance with Towing Contract No. —— 194—, and/or Towage Tariff No.—— 194— and Supplements thereto and Reissues thereof.

Inland Waterways Corporation
Operating the
Federal Barge Lines

Accepted:

By .....
Its Agent

.....
Owner

By .....

Date .....

(This form to be used to cover each and every towage service performed)

In the United States District Court

Interrogatories Propounded by Respondent to Libellant —Filed: May 25, 1953

1. State the date, type, terms, conditions, rental and location of arrangement or agreement between libellant and the National Oil Transport Corporation in connection with

Bisso No. 9. Please attach to your answers to these interrogatories the agreement or copy thereof.

2. Was this arrangement or agreement oral or in writing.

3. If oral, by whom was it made on the part of libellant, and by whom on the part of National Oil Transport Corporation.

4. Who is in possession of the written agreement, if such was made.

[fol. 18] 5. Under the arrangement or agreement, between the libellant and National Oil Transport Corporation, did libellant give exclusive control over Barge No. 9 to National Oil Transport Corporation.

(a) If exclusive control was not given, state the extent of control granted.

(b) By whose employees was the barge to be manned.

(c) Did the National Oil Transport Corporation have the authority to enter into contracts of towage for Barge No. 9.

(d) Was Libellant aware of the fact that National Oil Transport Corporation had contracted with respondent for the towage of Barge No. 9.

(e) Was libellant aware of the fact that National Oil Transport Corporation had entered into a held-harmless agreement with respondent.

(f) If so, give the date, the name of the person who learned this information and his position with libellant.

(g) Did libellant authorize National Oil Transport Corporation to enter into a hold-harmless agreement.

6. What was the rate of pay at which the arrangement was made between libellant and National Oil Transport Corporation.

7. Did libellant have a contract of insurance covering the Barge No. 9.

(a) Give the name of the company, the policy number, the date of the policy, and the type and extent of coverage thereon.

8. Was any money paid by such insurance company to libellant.

(a) The amount.
(b) The date.

[fol. 19] 9. Was any agreement, including subrogation and loan for use entered into between the insurance company and libellant. If such an agreement was entered into, in whose possession is it located. Please append a copy of any such agreement to your answers to these interrogatories.

10. Was the amount paid by check or in cash, and give the name of the person in whose possession the check is located.

11. Please attach a copy of the policy of insurance to your answers to these interrogatories.

(a) In whose possession is the original policy located.

12. Did payment of policy by insurance company to libellant represent the total liability of insurance company to libellant.

(S.) Francis A. Ledet, Assistant United States Attorney Proctor for Respondent.

In United States District Court

Exceptions to Interrogatories Propounded by Respondent —Filed: May 27, 1953

Libelant, Joseph A. Bisso, through its undersigned proctors of record excepts to Interrogatories 1 through 12, propounded by respondent, on the following grounds:

1. Although this case is nine years old respondent has waited until six days before trial to file its inter-[fol. 20] rogatories thus precluding libelant its full fifteen days within which to answer as provided by the Admiralty Rules of the Supreme Court of the United States (Rule 31). Libelant therefore submits

that respondent should not be permitted to propound interrogatories at this late date.

2. Interrogatories 1 through 6 are irrelevant and immaterial as they seek information concerning the charter of the Steel Tank Barge BISSO #9 to National Oil Transport Corporation, who is not a party to this suit, and the answers to said interrogatories can in no way affect the outcome of this litigation since libelant was not a party to the contract of towage between respondent and National Oil Transport. *The West Eldara, 1939 AMC 877, 828 CA 2: The Neils R. Finsen 1931 AMC 1014, 1018 (SD NY).*

3. Interrogatories 7 through 12 are irrelevant and immaterial as they are designed to elicit information concerning libelant's insurance on the Steel Tank Barge BISSO #9 for the purpose of showing that this suit has not been brought by the real party in interest. Although the question of real party in interest is opened to some extent on the civil side of the court it has been set at rest in admiralty.

> "The mere payment of a loss by the insurer does not indeed afford any defense, in whole or in part to a person, whose fault has been the cause of the loss, in a suit brought against the latter by the assured."

[fol. 21] *The Potomac, 105 US 630, 634 (1881). To the same effect, The Admiral Fiske, 1929 AMC 1130, 1132 (WD Wash.) aff'd., 1930 AMC 1220 (C.A. 9), cert. den. 282 US 874.* This principle applies *a fortiori* when the underwriters' payment has been made under loan receipt, *The Plow City, 1941 AMC 1564, 1568 (CA 3), cert. den., 315 US 798.*

s/Deutsch, Kerrigan & Stiles, Proctors for Libelant.

To: Francis A. Ledet
Assistant United States Attorney
U.S. Post Office Building
Proctor for respondent

Please take notice that the undersigned will bring the above exceptions on for hearing before this Court, at the

U.S. Post Office Building in New Orleans, on Wednesday, May 27, 1953, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

s/James Garrison to Deutsch, Kerrigan & Stiles, Proctors for Libelant.

CERTIFICATE OF SERVICE

(Omitted in printing)

[fol. 22] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF HEARING ON EXCEPTIONS, ETC., ARGUMENT & ORDER—May 27th, 1953

Wright, J:

This cause came on this day to be heard on motion of libellant to require further answers and for production of documents and papers; etc.

Present: James Garrison, Attorney for libellant; Francis A. Ledet, Asst. U. S. Attorney.

After hearing argument of counsel for the respective parties:

It is ordered that the motion of libellant to require further answers be, and the same is hereby, granted as to interrogatories Nos. 4, 9 and 13.

It is further ordered that the motion for production of documents be, and the same is hereby, denied.

It is further ordered that the exceptions of libellant to interrogatories of respondent be and the same is hereby overruled as to 1-6 and maintained as to 7-12.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF CASE CALLED, HEARING AND CONTINUANCE —June 1st, 1953

Wright, J:

This cause was this day called for trial.

Present: Frank Emett, Proctor for libellant; Francis Ledet, Asst. U. S. Attorney;

Witness for libellant:

[fol. 23] Daniel Joseph Quinn, sworn by clerk and, after hearing evidence and testimony on behalf of libellant, proctor rested.

Proctor for respondent moved the Court for a a dismissal, said motion was overruled.

Witness for respondent:

Edward A. Rucker, sworn by clerk
Sam Tithen, sworn by clerk
Earl K. Walker, sworn by clerk

and, after hearing evidence and testimony on behalf of the respondent, proctor rested; proctor for libellant also rested.

Proctors for the respective parties are to submit proposed Findings of Fact and Conclusions of Law by June 11th, 1953.

Proctor for respondent moved the Court for a dismissal; and the Court continued the matter until Friday, June 5th, 1953 at 9:55 a. m.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF FURTHER HEARING & SUBMISSION—June 5th, 1953

Wright, J:

This cause as continued from Monday, June 1st, 1953 was this day resumed.

Witness for plaintiff:

William A. Bisso, sworn by dy. clerk and, after hearing evidence and testimony on behalf of the plaintiff, the matter

[fol. 24] was submitted and the Court took time to consider. Proctors are to present Findings of Fact and Conclusions of Law by June 25, 1953.

IN UNITED STATES DISTRICT COURT

ANSWERS TO INTERROGATORIES PROPOUNDED BY RESPONDENT—Filed—June 5, 1953

1. Libelant bareboat chartered the new, unmanned, Steel Barge BISSO #9 to National Oil Transport Corporation by written contract on September 15, 1941. Thereafter the original charter was extended until the date the BISSO # 9 sank. A duplicate original of the charter is attached hereto which sets out all of the terms of the charter.
2. The charter party was in writing.
3. The charter party was not oral.
4. The duplicate original is attached hereto.
5. No.

(a) There were certain rights withheld from the charter, such as a restriction on the type cargo to be carried, the waters to be navigated, etc.
(b) The BISSO #9 was an unmanned tank barge.
(c) Yes.
(d) No.
(e) No.
(f) No answer is required.
(g) No.

6. Eleven hundred and 00/1000 ($1,100.00) per month.

[fol. 25] By (S.) W. A. Bisso, President, New Orleans Coal and Bisso Towboat Company.

Duly sworn to by W. A. Bisso, jurat omitted in printing.

[fol. 26] RESPONDENT'S EXHIBIT 4 TO ANSWERS TO INTERROGATORIES

Filed: June 5, 1953

INLAND WATERWAYS CORPORATION
Operating The
FEDERAL BARGE LINES

———— 193—

Received from ——— (hereinafter referred to as "owner") Craft No. or named ———— (hereinafter referred to as "craft to be towed"), dimensions ————, Draft ———, Loaded ——, Light ——, to be towed by the Federal Barge Lines, from ———— to ————.

The Federal Barge Lines agree to tow the above mentioned craft under the terms and conditions shown below.

(1) The service above mentioned rests alone upon this contract and neither Federal Barge Lines nor its boats or servants shall be held, in any way, to common carrier liability.

(2) This towing contract having been entered into without inspection by Federal Barge Lines of "craft to be towed," it shall be null and void, and Federal Barge Lines shall be under no obligations hereunder, if, in the judgment of the master of the tow, the "craft to be towed," or any part thereof, is unseaworthy, or for any reason would constitute a risk or hazard to the tow, and/or in case any misstatement has been made in giving a description of the "craft to be towed."

(3) The "craft to be towed" will be moved, only, at the convenience of Federal Barge Lines and not by any par-[fol. 27] ticular tow and Federal Barge Lines reserve the right to change "craft to be towed" from one to another of its tows as frequently as it may find it convenient to do so.

(4) The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo and neither the boats and/or any other equipment used in said service, nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the "craft to be towed" or *tis* cargo, nor for any damage done by the "craft to be towed" however occurring.

(5) The masters and crews and employees of all boats and/or other equipment assisting the "craft to be towed" shall, in the performance of said service, become and be the servants of the "craft to be towed" regardless of whether the "craft to be towed" assist in the service in any way and irrespective of whether they be aboard the "craft to be towed" or in command thereof.

(6) "Owner" agrees to indemnify and hold harmless Federal Barge Lines from any liability to or for account of the crew on the "craft to be towed" however arising and the said "owner" assumes full liability for any accident, damage, injury, or loss of life to the said crew on the "craft to be towed" however arising.

(7) And the said "owner" agrees to defend any and all suits or other actions which may be brought by or for account of the members of the crew aforesaid and to pay and sati-fy any and all judgments that may be rendered therein.

[fol. 28] FEDERAL BARGE LINES

By _____

Its Agent

Accepted:

_____

By _____

Date _____

(This form to be used to cover each and every towing service performed)

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed September 1, 1953

WRIGHT, District Judge:

The issues of fact and law having come on to be heard on the pleadings and proofs of the parties and due delibera-

tion having been had, the court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. On September 15, 1941, New Orleans Coal and Bisso Towboat Company chartered its steel tank barge BISSO #9 to National Oil Transport Corporation for a period of two years, from December 1, 1941, to December 1, 1943. The Charter which was thereafter extended to November 15, 1944, provided:

> "Lessor consents that Lessee may contract to have the barge towed pursuant to a towing contract in substantially the form of the towing contract employed by Federal Barge Lines (Form A194-Rev.) which form of contract contains the following clause:
> [fol. 29] " 'The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo, and neither the boats and/or other equipment used in such service nor the owner, charterer or hirer thereof, shall be liable for any loss or damage to the "craft to be towed" or its cargo, nor for any damage done by the "craft to be towed" however occurring; provided, however, the tug to which this barge may be allocated shall be approved by the Hull Underwriters on the barge.' "

2. On December 1, 1943, National entered into a blanket contract of towage with Federal Barge Lines, whereby Federal agreed to tow a number of National's barges, including the BISSO #9, on the Mississippi River. This contract provided:

> "(4) The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the boats and/or any other equipment used in said service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring.
> "The master and crews and employees of all boats and/or other equipment assisting the 'craft to be

towed' shall, in the performance of said service, become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the service in any way and irrespective of whether they be aboard the 'craft to be towed' or in command thereof."

3. In early May, 1944, respondent's Towboat CAIRO took in tow, eight loaded barges belonging to various persons, and proceeded up the Mississippi River from New Orleans. Libelant's steel tank barge BISSO #9 was one of the barges, and was bound for Cairo, Illinois, with a cargo of gasoline.

4. The CAIRO'S tow was split up at or near Vicksburg, Mississippi, and moved alternately in groups of four barges, or "double tripped", due to the high waters and dangerous [fol. 30] conditions prevailing in the Mississippi River above that point at that time.

5. The group of four barges here involved was made up at Vicksburg two abreast, and was being pushed ahead of the CAIRO, pursuant to the custom on the Mississippi River. The IWC 240 and IWC 321 were the port and starboard face barges; the BISSO #9 was the port lead barge and the APL 102 the starboard lead barge. The barges were secured to each other and to the CAIRO by means of wires and manila lines.

6. The flotilla arrived in the vicinity of the Greenville Highway Bridge (MAHP 522.3) at approximately 3:00 AM on May 12, 1944 The Mississippi River at this point has a navigable width of some 2200 feet.

7. The Greenville Highway Bridge is constructed on a number of concrete and steel piers, two of which are sunk in the river bottom approximately one-third of the distance from the east and west banks respectively, thus making three spans all of which are navigable during high water. The center span is 800 feet in width and is designated as the "navigation span". The east and west spans are slightly narrower than the center span. Above the Greenville Bridge there was a large submerged sand bar that ran some 600 or 700 feet out from the east bank. This bar created large eddies, or whirlpools, for approximately one-third of the width of the river out from the east bank,

and rendered navigation through the east span dangerous. In the other two-thirds of the river the current flowed swiftly, at approximately seven miles per hour, in the di- [fol. 31] rection of the west bank. In this section of the river there were large "boils" or turbulences in the water making steering extremely difficult. This condition was normal at that point on the river during high water.

8. The CAIRO attempted to pass through the east or right ascending span with her tow, but this maneuver proved unsuccessful because the current was too swift, and an eddy was pulling the tow toward the east bridge-pier. The CAIRO accordingly dropped down-river, out of the east span, approximately 1000 feet below the Greenville Bridge. The pilot and master then attempted to proceed full ahead through the center or navigation span.

9. When the CAIRO and her tow were under the middle of the center span, the flotilla lost all headway. The master and pilot then rang the engine room for emergency full ahead. This signal was answered by the engine room, and the shaft speed was increased four or five revolutions, which accelerated the flotilla's speed through the water thirty-five feet per minute, or less than one-half mile per hour. Shortly after the flotilla's speed was increased, a large "boil" threw the bow of the CAIRO'S tow toward the east bank of the river. To compensate for this movement, the CAIRO'S rudders were put hard left. The flotilla "crabbed" or made leeway to starboard under this maneuver and the port lead barge (APL 102) struck the east pier of the Greenville Bridge abaft her starboard beam. The impact of the collision parted the port coupling wires securing the BISSO #9 and the IWC 240. The BISSO #9 pivoted on the starboard coupling wire, which was [fol. 32] still intact, and was swept up against the east bridge pier where she buckled amidships, turned over and sank.

Conclusions of Law

1. This court has jurisdiction over the subject matter of this action and venue is properly laid in the Eastern District of Louisiana. 28 U.S.C. §1333.

2. When a moving tug brings her "dumb tow" into collision with a stationary object, there is a presumption that

the collison occurred through the negligence of the tug. *The Granite State*, 70 U. S. 310, 314; *The Clarence P. Howland*, 1927 AMC 564 (CCA 2); *The Crown of Galicia*, 232 F. 305 (CCA 2); *The W. H. Gilbert*, 232 F. 547 (CCA 6); *The J. N. Gilbert*, 222 F. 37 (CCA 5); *The Thode Fageland*, 214 F. 775 (CCA 2).

3. This presumption of negligence runs in favor of the "dumb tow" as well as the stationary object; and the tug bears the burden of going forward with proof that no act or omission on her part caused the collision in order to exculpate herself from fault. *The Steamer Webb*, 81 U. S. 406, 414; *Simkins* v. *Morrison & Sons*, 107 F. 2d 121, 1940 AMC 24, 26 (CCA 5); *The Clarence P. Howland*, supra; *Kiernan* v. *Lake Champlain Transportation Co.*, 273 F. 499, 501 (CCA 2). *The W. G. Mason*, 142 F. 913, 915 (CCA 2).

4. The Towboat CAIRO was negligent in attempting to negotiate a passing under the center navigation span of the Greenville Highway Bridge, with a tow of four loaded barges, against a seven mile current, from a position dead [fol. 33] in the water, one thousand feet below the span. One thousand feet was not sufficient distance to permit the heavy flotilla to reach full speed, known to be necessary to negotiate the span against the swift current and "boils" prevailing in the river at that point.

5. The Towboat CAIRO was negligent in failing to break up her tow of four loaded barges into groups of two, "double tripping" them through the Greenville Highway Bridge when difficulty was anticipated, or should have been anticipated, in negotiating the span against the swift current and "boils" prevailing in the river at that point. *Kiernan* v. *Lake Champlain Transportation Co.*, supra.

6. The charter between the New Orleans Coal and Bisso Towboat Company and the National Oil Transport Corporation dated September 15, 1941 was a demise of the vessel to the charterer and the National Oil Transport Corporation became the owner thereof pro hac vice. Consequently, the contract of towage entered into between the National Oil Transport Corporation and respondent is binding on libelant, the owner of the vessel, in respect to any claims against respondent for damage to the vessel. *Monk* v.

Cornell Steamboat Co., 198 F. 472 (CCA 2); *The Daniel Burns*, 52 F. 159.

7. The provision of the towage contract which reads that "the movement contemplated will be done at the sole risk of the 'craft to be towed' " . . . does not exonerate the tug from liability for its negligence. *The Syracuse*, 79 U. S. 167, 171; *The Wash Gray*, 277 U. S. 66, 73, 1928 AMC 923.

[fol. 34] 8. The provision of towage contract which provides that "the masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed' shall, in the performance of said services become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the services in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof . . . "when read with the other provisions in the contract relative to release from liability unequivocally evidences a clear intention on the part of the parties to the contract to relieve the tug from liability even for its own negligence. Such a provision is not against public policy. In fact the highest public policy is found in the enforcement of the contract which was actually made. It would be unconscionable to allow libelant upon the occur-ence of a mishap to repudiate the agreement upon which the towage service was obtained. *Sun Oil Company* v. *Dalzell Towing Co.*, 287 U.S. 291, 1932 AMC 149. To hold that the towage contract did not relieve the tug from liability for its own negligence would be to stultify and set at naught the obvious intention of the parties.

Decree accordingly.

New Orleans, Louisiana,

September 1st, 1953.

s/J. Skelly Wright, United States District Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed September 1, 1953

WRIGHT, District Judge:

This case graphicaly protrays the quand-ry in which the Marine Industry, as it relates to towing contracts, finds itself because of two decisions of the Supreme Court. In the first of these decisions, The WASH GRAY[1], the court held, in interpreting a towage contract, that the provision "all risk to be borne by the tow" did not release the tug from liability for damage caused by its negligence, whereas in *Sun Oil Company* v. *Dalzell Towing Company*,[2] the court held valid and enforcible the so-called pilotage clause of a towing contract providing that the tug and her owner will not be liable for any damage resulting from orders given by the tug captain to the assisting tugs while the tug cap-[fol. 36] tain is aboard the assisted vessel.

Respondent here, in an effort to protect itself under this state of the law, used in its towage contract the general release from liability provision[3] as found in The WASH GREY and a clause[4] similar to the pilotage clause in *Sun Oil* v. *Dalzell*. It urges either or both of these provisions,

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[1] 277 U. S. 66, 1928 AMC 923.

[2] 287 U. S. 291, 1932 AMC 149.

[3] The provision reads as follows:

"(4) The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo."

[4] The clause reads as follows:

"The masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed' shall, in the performance of said service, become and be the servants of the 'craft to be towed' regardless of whether the 'craft to be towed' assists in the service in any way and irrespective of whether they be aboard the 'craft to be towed' or in command thereof;"

as well as other release language in the contract,[5] as a defense to the action by the libelant charging damage to its barge as a result of the negligence of the respondent's tug.

The litigious history of the release from liability clause in towing contracts properly begins in 1872 with The Steamer Syracuse[6] in which the Supreme Court announced the principle that where a towage contract recites that the towage is to be performed "at the risk of the master and [fol. 37] owner" of the tow, the tug is not exempt from liability for its own negligence. Following The Syracuse there arose a conflict between the Court of Appeals for the Second Circuit[7] and the Court of Appeals for the Ninth Circuit[8] in respect to the enforcibility of the release from liability clause where negligence on the part of the tug is shown, the Second Circuit, finding that the Supreme Court in The Syracuse had not squarely decided the point, held that where a towage contract provided that the towage would be at the risk of the towed vessel, such contract exempted the tug from liability even for its own negligence. The Ninth Circuit, on the other hand, assuming The Syracuse to be a square holding on the effect of a release from liability clause, held that the clause did not relieve the tug from liability for its own negligence. This conflict apparently was resolved in favor of the Ninth Circuit by the Supreme Court in The Wash Gray wherein it

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[5] The other release language reads as follows:

> ". . . and neither the boats and/or any other equipment used in said service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring."

[6] 12 Wall. 167.

[7] The Oceanica, 170 F. 893 (CCA 2).
Ten Eyck v. Director General of Railroads, 267 F. 974 (CCA 2).

[8] Alaska Commercial Co. v. Williams, 128 F. 362 (CCA 9)
Mylroie v. British Columbia Mills Tug & Barge Co., 268 F. 449 (CCA 9). Sacramento Navigation Co. v. Salz, 3 F. 2d 759 (CCA 9).

was held that a contract which provided that all risk would be borne by the towed vessel did not relieve the tug from liability for its own negligence.

[fol. 38] Four years later, however, in *Sun Oil* v. *Dalzell Towing Company*, the Supreme Court held valid and enforcible, against a charge of negligence, the so-called pilotage clause of a towage contract in which it was provided that the employees of the tug became the employees of the tow when aboard the tow directing the navigation of the tug. In so deciding the Supreme Court said [9] that the va-

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[9] In *Sun Oil Co.* v. *Dalzell Towing Company*, at page 294, the court said:

> "The validity of its applicable provision cannot reasonably be doubted. So far as concerns the service to be rendered under the agreement, respondent was not a common carrier or bailee or bound to serve or liable as such. Towage does not involve bailment, and the services covered by the contract were less than towage. Stevens v. The White City, 285 U. S. 195, 200. There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence. Railroad Co. v. Lockwood, 17 Wall. 357. Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 440. Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but on the contrary, as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made.' Santa Fe, P. & P. Ry. Co. v. Grant Bros. Co., 228 U. S. 177, 188."

lidity of the clause could not be reasonably doubted, that no rule of public policy makes invalid a release clause even as to negligence, and that the highest public policy is found in the enforcement of the contract as it was written.

Since these two decisions, the position of the Supreme Court with respect to release clause has been a matter of [fol. 39] much speculation by the lower courts and by law writers. Unfortunately, in The Wash Gray the court did not disclose its reasons, other than citing The Syracuse, for holding the release clause unenforcible as against the tug's own negligence, and in *Sun Oil* v. *Dalzell*, while the principles underlying the Court's conclusion were clearly stated, the clause in question was materially different from the general release from liability clause.

These cases can be reconciled only by assuming that the Supreme Court in The Wash Gray refused to enforce the release clause against a charge of negligence on the part of the tug, not because it was against public policy so to do, but because it felt that the language of the release clause there in suit was not sufficiently unequivocal to release the tug from liability for its own negligence, it appearing that in neither The Syracuse nor The Wash Grey did the clause in question specifically say that the tug was released from liability for its own negligence. This conclusion is supported by the fact that the Supreme Court has held that a tug is not a common carrier and owes its tow only the duty of ordinary care[10] and, consequently, the doctrine that common carriers and others under like duty cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence is not applicable to the contract of towage.[11] Therefore, since [fol. 40] the contract of towage is not so affected with a public interest as to make a release from liability clause against public policy and since the highest public policy is found in the enforcement of a contract as it is written, there would seem to be no reason why such clause should not be valid and enforcible even as to the negligence of

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[10] Stevens v. The White City, 285 U. S. 195, 1932 AMC 468.

[11] Sun Oil Co. v. Dalzell Towing Co., supra.

the tug, provided the agreement of the parties on this point is clear and unequivocal.

Applying the above principles to the case at bar, it is clear that the general release clause in the contract in suit is unenforcible under The Wash Gray, the tug's exemption from liability for negligence not being sufficiently spelled out. The so-called pilotage clause, however, presents a greater problem. The pilotage clause here differs from the pilotage clause in *Sun Oil* v. *Dalzell* in that it is provided that the employees of the tug are employees of the tow is irrespective of whether they are aboard the assisted vessel. The difference in the clause indicates the difference in the type of service performed. In *Sun Oil* v. *Dalzell*, the tower, was required under his contract to move a sea-going vessel of considerable size through a crowded harbor to a dock. That service is customarily performed by the tug captain boarding the assisted vessel and directing her navigation as well as the navigation of the tug or tugs. Here the service required under the contract was simply towing a dumb barge from one port to another. While the difference in the service to be performed under the Sun Oil contract and the contract here is obvious, the facts of the two cases are not so different that a different result should be [fol. 41] reached as to the validity and enforcibility of the clause in question. The general principles announced by the Supreme Court in *Sun Oil* v. *Dalzell* are certainly broad enough to cover the pilotage clause here and since the language of that clause together with the other release language in the contract clearly evidences the obvious and unmistakable intent of the parties that respondent be relieved from liability for its own negligence, the claim of libelant herein must fail.

Decree pursuant to the findings of fact and conclusions of law this day found.

New Orleans, Louisiana,
September 1st, 1953.

s/J. Skelly Wright, United States District Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

DECREE—Filed September 14, 1953

This cause having duly come on to be heard on the pleadings and briefs, and having been argued and submitted by the advocates of the respective parties, and the Court, after due deliberation, having rendered its opinion in writing and directing a decree dismissing the libel herein with costs,

It is ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with costs.

New Orleans, Louisiana, September 14th, 1953.

(S.) Skelly Wright, United States District Judge.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 21, 1953

Sirs, please take notice that William A. Bisso, Jr., Receiver, New Orleans Coal and Bisso Towboat Company, libelant herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final decree of this court, which decree was entered herein on September 16th, 1953.

Very truly yours,

(S.) Deutsch, Kerrigan & Stiles, 1700 Hibernia Bank Bldg., New Orleans, Louisiana.

[fol. 43] Phelps, Dunbar, Marks & Claverie United Fruit Building, New Orleans, Louisiana, Proctors for Libelant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—September 22, 1953

The within appeal is hereby allowed.

(S.) J. Skelly Wright, United States District Judge.

In United States District Court

Assignment of Errors—Filed September 23, 1953

The Court erred in finding that the provision, of the towage contract between National Oil Transport Corporation and respondent, that, "the masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed' shall, in the performance of said services become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the services in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof . . .", released respondent from liability to libelant for the negligence of the master of the Towboat CAIRO.

(S.) Deutsch, Kerrigan & Stiles, Phelps, Dunbar, Marks & Claverie, Proctors for Libelant.

New Orleans, Louisiana. September 23rd, 1953.

[fols. 44-45] Designation of Record on Appeal (omitted in Printing)

[fol. 45a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 14,802

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO.

versus

INLAND WATERWAYS CORP.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Dated February 23rd, 1954, omitted in printing.

[fol. 48] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14802

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT CO., Appellant

versus

INLAND WATERWAYS CORP., Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

OPINION—Filed March 26, 1954

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges

HUTCHESON, Chief Judge: This is an appeal from a final decree dismissing appellant's libel in personam against Inland Waterways Corporation, owner of the Towboat Cairo, to recover for loss of appellant's Steel Tank Barge Bisso #9 while in tow of the Cairo, by the latter's negligence.

[fol. 49] On December 1, 1943, National Oil Transport Corporation, charterer of appellant's barge, entered into a contract with appellee for towage of a number of Na-

tional's barges, including the Bisso #9, on the Mississippi River. This contract provided:

> "The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the boats and/or any other equipment used in said service nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed' however occurring.
>
> "The masters and crews and employees of all boats and/or other equipment assisting the 'craft to be towed,' shall in the performance of said service, become and be the servants of the 'craft to be towed,' regardless of whether the 'craft to be towed assists in the service in any way and irrespective of whether they be aboard the 'craft to be towed' or in command thereof."

In May, 1944, appellee's Towboat Cairo took in tow eight unmanned barges belonging to various persons, and proceeded up the Mississippi River from New Orleans. The Bisso #9 was one of these barges. None of the barges had any motive power or steering mechanism.

Because of high water and dangerous conditions prevailing in the Mississippi River above Vicksburg, the Cairo's tow was split up near that point, and moved alternately in groups of four barges, of "doubles tripped."

While attempting to negotiate the center span of the Greenville Highway Bridge, the Cairo negligently brought [fol. 50] her tow of four barges into collision with a bridge pier; and appellant's barge was lost in the collision as a direct result of the Cairo's negligence.

The District Court, making full findings of fact and conclusions of law, and filing an opinion,[1] held that the collision was attributable to the negligence of the Cairo; that the "release towage agreement" in question did not relieve the Cairo from liability for negligence; but that the "pilotage clause" was broad enough to make the Cairo's crew appellant's servants and to free appellee from responsibility for their negligence. The libel was accordingly dismissed.

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[1] Bisso v. Inland Waterways Corp., 114 Fed. Supp. 713.

Appellant, raising no question of fact, but resting its case on the facts found by the district judge and his conclusion that the first clause, "sole risk and release clause," of the towage contract was, under The Syracuse, 79 U. S. 167, and The Wash Gray, 277 U. S. 66, cases invalid, is here insisting that the court erred in holding the second clause, the so-called "pilotage clause," in the contract, providing that the personnel of the tug are to be deemed "the servants of the tow," releases the tug from liability for loss of the tow by negligence of the master of the tug.

Appellee, opposing this view, urges upon us that, far from its being clear, as appellant argues, that a pilotage clause finds justification only where the tow is manned and under its own power, the situation of a tug with a dumb tow makes it more necessary for it to relieve itself of what may approach an insurer's liability.

[fol. 51] In addition, as to the "sole risk" or "release" clause, which the court below held invalid, appellee insists that this clause also was valid and effective. Arguing that the cases cited by the district judge in support of his view that the clause was invalid, are not authority for the holding, appellee, citing The Oceania, 170 Fed. 893 and *Ten Eyck v. Director General of Railroads*, 267 Fed. 974, insists that all that the Syracuse and Wash Gray cases held and all that they stand for is that the exculpatory provision denied effect in each of them was not intended by the parties to encompass negligence or at least they did not make this sufficiently clear. It argues in short that these two cases are but applications of the general rule that, while releases from liability for negligence are, except as to common carriers, bailees, etc., generally valid, they are construed strictly against the party favored, and, unless clearly and unequivocally showing that they include negligence, they will not be construed to include it.[2] So arguing, it insists that the questioned clause in The Syracuse failed to evince an unequivocal intention to include the negligence of the tower in the risk assumed by the tow, and that the same is true of the release clause involved in The Wash Gray.

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[2] Noonan v. Bradley, 9 Wall. 394; Halliburton Oil Well Cementing Co. v. Paulk, 180 F(2) 79; Fairfax Gas & Supply Co. v. Hadary, 151 F(2) 939.

In strong support of these views, the brief *amici curiae*, basing its arguments on the settled law that a tug is not a common carrier when it engages in towage, The Margaret, 94 U. S. 494, and that the relationship of bailor-bailee does not exist between tug and its tow,[3] insists that if the tug is not a common carrier or bailee as to its tow, there is no [fol. 52] reason in logic or in law why it should not be permitted full freedom of contract in limiting or restricting its liability.

Urging, therefore, that there should be, and is, no difficulty in the way of parties agreeing as they please in cases such as this, and that if the parties to a contract unequivocally shift the liability for loss or damage to the tow from the owner of the tug to the owner of the tow, there can be no reason for holding that the shift is invalid, they insist that it would be difficult, if not impossible, to find apter language for doing so than that employed here. So insisting, they urge upon us that while the district judge was right in exonerating the tug under the "pilotage" clause, he erred in holding that the release towage agreement did not release the tug from negligence.

We find ourselves in general agreement with the approach of appellee and *amici curiae* to the questions presented and the positions taken by them below and here, that not merely one, as found by the district judge, but both of the clauses relied on are valid and effective to release the appellee from liability, and that the decree should, therefore, be affirmed.

Affirmed.

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[3] Stevens v. The White City, 285 U. S. 195; New Orleans Coal & Bisso Towboat Co. v. United States, 86 F(2) 53.

[fol. 53] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,802

WILLIAM A. BISSO, JR., Receiver, NEW ORLEANS COAL AND BISSO TOWBOAT CO.,

versus

INLAND WATERWAYS, CORP.

JUDGMENT—March 26th, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, William A. Bisso, Jr., Receiver, New Orleans Coal and Bisso Towboat Co., be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 50

WILLIAM A. BISSO, JR., Receiver, New Orleans Coal and Bisso Towboat Co., Petitioner,

vs.

INLAND WATERWAYS CORPORATION

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.